Office-Supreme Court, U.S.
FILED
DEC 17 1984
ALEXANDER L. STEVAS,
CLERK

84-980 (1)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

No. _____

FERNANDO FUENTES-COBA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RANDY FRANCES KANDEL
Shereff, Friedman, Hoffman
& Goodman
919 Third Avenue
New York, New York 10022
(212) 758-9500

Of counsel to:
McMasters & Forman, P.A.
321 N.E. 26th Street
Miami, Florida 33137

James McMasters
McMasters & Forman, P.A.

David Rudovsky
1425 Walnut Street
Philadelphia, Pennsylvania 19102
OF COUNSEL

64pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the admission of expert testimony explaining and interpreting the controlling regulations in a criminal case by the former high ranking executive official who had drafted and implemented those regulations violate fundamental constitutional separation of powers principles?

2. Further, does such testimony transgress the permissible limits of expert witness testimony under Rule 704, Fed. Rules of Evidence?

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

No. _____

FERNANDO FUENTES-COBA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RANDY FRANCES KANDEL
Shereff, Friedman, Hoffman
& Goodman
919 Third Avenue
New York, New York 10022
(212) 758-9500

Of counsel to:
McMasters & Forman, P.A.
321 N.E. 26th Street
Miami, Florida 33137

James McMasters
McMasters & Forman, P.A.

David Rudovsky
1425 Walnut Street
Philadelphia, Pennsylvania 19102
OF COUNSEL

TABLE OF CONTENTS

	PAGE
Table of Contents.....	i
Table of Citations.....	iii
Opinions Below.....	1
Jurisdiction.....	2
Questions Presented.....	2
Constitutional and Statutory Provisions Involved.....	2
Statement of the Case.....	3
Statement of Prior Proceedings.....	3
Statement of the Facts.....	5
Reasons for Granting the Writ.....	7
Preliminary Statement.....	7
A. The Eleventh Circuit's decision affirming admissibility of expert testimony to explain the controlling law conflicts with decision of the Sixth and Second Circuits.....	10
B. Admission of explanatory legal testimony by an Executive official violates the separation of powers mandated by the Constitution.....	16

PAGE

C. Admission of expla-.....26
natory legal testimony
violates the limits
placed on expert tes-
timony by Federal Rule
of Evidence 704

Conclusion.....29

Certificate of Service.....31

TABLE OF CITATIONS

CASES	PAGE
Alford v. United States, 282 U.S. 687 (1931)	23
Federal Aviation Administration v. Landy, 705 F.2d 624 (2nd Cir.) cert. denied _____U.S._____, 104 S.Ct. 243 (1983)	19
Gonzales v. Beto, 405 U.S. 1052 (1972)	24
Huff v. United States, 273 F.2d 56 (5th Cir. 1959)	19
Marx & Co. v. Diner's Club, Inc., 550 F.2d 505 (2nd Cir.) cert. denied 434 U.S. 861 (1977)	10, 11, 12, 14, 25
O'Donoghue v. United States, 289 U.S. 516 (1933)	18, 19
Owen v. Kerr-McGee Corp., 698 F.2d 236 (5th Cir. 1983)	25, 29
Roberts v. Cooper, 20 How. 467 (1857)	8, 19, 20
Smith v. Illinois, 390 U.S. 129 (1968)	23
Turner v. Louisiana, 379 U.S. 466 (1965)	24
Union Bridge Co. v. United States, 204 U.S. 364 (1906)	18, 21
United States v. Grimaud, 220 U.S. 506 (1911)	18, 21, 22

	PAGE
United States v. Jensen, 608 F.2d 1349 (10th Cir. 1979)	14
United States v. Milton, 555 F.2d 1198 (5th Cir. 1977)	26
United States v. Zipkin, 729 F.2d 384 (6th Cir. 1984)	9, 10, 12, 13, 14, 15, 23
Wade v. Haynes, 663 F.2d 778 (8th Cir. 1981) aff'd 461 U.S. 30 (1983)	29
Wong Wing v. United States, 163 U.S. 228 (1896)	21
STATUTES AND REGULATIONS	
Trading With the Enemy Act, 50 U.S.C. Appendix 5(b)	3, 5, 16, 17
31 C.F.R. 515.201	5
31 C.F.R. 515.560	5, 6
OTHER	
Federal Rules of Evidence Rule 704	2, 3, 9, 26, 27, 28, 29
Supreme Court Rules Rule 17.1(a)	12
Adv. Comm. on Proposed Rules Note to Rule 704, Fed. Rules of Evid.	26
THE FEDERALIST PAPERS, No. 78 (A. Hamilton) (Mentor ed. 1961)	18

	PAGE
C. Fredericks, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA (4th ed. 1958)	18
D. Louiselle and C. Muller, FEDERAL EVIDENCE §39 (1979)	13
McCormick, HANDBOOK OF THE LAW OF EVIDENCE §12 (2d ed. (1972)	13
B. Schwartz, ADMINISTRATIVE LAW (1976)	22
M. Shapiro, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES (1968)	21
J.G. Sutherland, STATUTES AND STATUTORY CONSTRUCTION, §4816 (F.E. Horak, Jr. ed. 1943)	20, 25
3 J. Weinstein and M. Burger, WEINSTEIN'S EVIDENCE, ¶704[1] at 704-5	13
9 J. Wigmore, EVIDENCE §2549 (2d ed. 1940)	13
Bank and Poythress, The Elements of Persuasion in Expert Testimony, 10 J.Psych. L. 173 (1982)	24, 25
McNichols, Some Random Thoughts on The Proposed Federal Rules of Evidence, 7 Idaho L.Rev. 187 (1970)	28
Stoebeck, Opinions on Ultimate Facts: Status, Trends and a Note of Caution, XL Den. L.Cen. J. 226 (1964)	28

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

No. _____

FERNANDO FUENTES-COBA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, FERNANDO FUENTES-COBA, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, filed August 13, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is printed as Appendix A hereto and is reported in 738 F.2d 1191. Set forth as Appendix B is

the Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc, dated October 15, 1984.

JURISDICTION

The judgment of the United States Court of Appeals was entered on August 13, 1984; petition for rehearing and suggestion for rehearing on banc was denied on October 15, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Does the admission of expert testimony explaining and interpreting the controlling regulations in a criminal case by the former high ranking executive official who had drafted and implemented those regulations violate fundamental constitutional separation of powers principles? Further, does it transgress the permissible limits of expert witness testimony under Rule 704, Fed. Rules of Evidence?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Rule 704, Federal

Rules of Evidence, Opinion on Ultimate Issue, which states:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact;

and Article III, Section 2, cl. 1 of the United States Constitution, which states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

and the fundamental separation of powers inherent in the structure of the Constitution.

STATEMENT OF THE CASE

Statement of Prior Proceedings

On May 19, 1982, a three-count indictment was filed against Fuentes-Coba, alleging various violations of the Trading With the Enemy Act, 50 U.S.C. Appendix 5(b) (Case No. 82-248-Cr-WHM) (R. 1-7).[1] Motion

---

1 References to the record in the courts below will be abbreviated as follows:

> "tr." refers to the transcript of the trial in the United States District

for Change of Venue (R. 149-172), filed August 13, 1982, was denied (R. 204). On November 15, 1982, Counts II and III were dismissed (tr. 5,20), and petitioner proceeded to trial on Count I before the Honorable James W. Kehoe and the jury. On November 18, 1982, the jury returned a verdict of guilty (R. 273). On December 14, 1982, petitioner was sentenced to a term of imprisonment of one year and a fine of $10,000.00 (R. 344).

A notice of appeal was timely filed, and argument was heard on May 22, 1984, before the United States Court of Appeals for the Eleventh Circuit. On August 13, 1984, in an opinion by Circuit Judge Albert J. Henderson, the decision of the district court was affirmed.

Petition for Rehearing and Suggestion for Rehearing En Banc was denied on

---

1 Court for the Southern District of Florida.

"R." refers to the Record on Appeal to the United States Court of Appeals for the Eleventh Circuit.

October 15, 1984. On October 26, 1984, the Eleventh Circuit granted a Stay of Mandate pending disposition of the Petition for Writ of Certiorari to the United States Supreme Court.

Statement of the Facts

Under the statutory license of 31 C.F.R. 515.560, which authorized all transactions "ordinarily incident to travel to, from and within Cuba," Petitioner Fernando Fuentes-Coba ("Fuentes-Coba") was the major air charter broker supplying airplanes for tourist flights to Cuba (tr. 162, 469-470). He was convicted, after a three-day jury trial, of a violation of Section 5(b) of the Trading with the Enemy Act, 15 U.S.C. Appendix 5(b), and 31 C.F.R. 515.201, for allegedly participating in the shipment of ham and cheese, used Pepsi Cola machines, office equipment, United States quarters, and other similar items aboard tourist planes bound for Cuba. Upon his conviction, Fuentes-Coba was sentenced to a fine of $10,000 and a year in federal prison. Fuentes-Coba remains at

liberty pending review by this Court.

The Government's evidence at trial was internally inconsistent and weak, prompting even the trial judge to comment on the weakness of the prosecution's case (tr. 520). Nonetheless, to buttress its otherwise weak case, the Government called as an expert witness Stanley Sommerfield, former Director of the Office of Foreign Assets Control. After telling the jury that he had drafted the Cuban Foreign Assets Control Regulations (tr. 363) - the very regulations under which Fuentes-Coba was tried - Sommerfield "explained" the Regulations erroneously. He testified, incorrectly and contrary to the plain language of 31 C.F.R. 515.560(4), that shipments of the kind alleged by the Government could never be lawful or licensed (tr. 369), that there "was no possibility of licensing any commercial transaction of that type..." (tr. 369), and that no possible authorization, either general or special, existed (tr. 371).

In addressing the expert witness issue, as one of the multiple issues raised

on appeal, the Eleventh Circuit recognized that Sommerfield "went into great detail to explain the embargo; its exemptions, and the licensing provisions for various transactions." However, the Court held that in light of the complexity of the applicable regulations, and the lack of objection at trial, the witness' testimony "provided the jury with a valuable perspective," 738 F.2d at 1197-1198.

REASONS FOR GRANTING THE WRIT

Preliminary Statement

Petitioner's criminal conviction for an obscure regulatory violation was secured upon the "expert" testimony of the former Director of the Office of Foreign Assets Control, who was the draftsman of the controlling regulations and who testified to their meaning and application. This former high ranking executive official lectured the jury on the applicable law, interpreted the law for the jury and the trial court and delivered conclusory statements on defendant's guilt. His testimony was tantamount to a directed verdict against the defendant.

This case starkly illustrates the danger of excessive reliance upon interpretations of Executive branch officials in matters within the judiciary's proper responsibility. Thus, it provides this Court with an important opportunity to clarify the appropriate parameters of the Constitution's fundamental separation of powers between the branches of government. At the same time, it is an opportunity to provide guidance in an important area of the law of evidence: the scope of expert testimony. The trial court, as affirmed by the Eleventh Circuit, in essence delegated its Article III Constitutional authority and obligation to decide the law of the case before it to an executive branch official. In so doing, it violated the century old rule that the testimony of executive officials "cannot be read as evidence of what the law is or ought to be." Roberts v. Cooper, 20 How. 467, 481 (1857).

The constitutional harm done by the Court of Appeals' affirmance of the trial court is exacerbated by the fact that the

Court's decision likewise invites abuse of Rule 704, Fed. Rules of Evid., governing expert witness testimony. In abolishing the prohibition on testimony on ultimate issues by expert witnesses, Rule 704 has engendered confusion and conflict both between and within the circuits, about the admissibility of expert testimony on the law. The Eleventh Circuit's opinion permitting excessive deference to an "expert" in cases involving complex statutory schemes, is in direct conflict with the recent Sixth Circuit opinion in United States v. Zipkin, 729 F.2d 384 (6th Cir. 1984). This conflict highlights the critical need for review and guidance from this Court.

Clarification of the standards for application of Rule 704 is timely and in order. The proliferation of the use of expert testimony throughout the courts of our nation would, by itself, justify this Court's review. Given the constitutional issue raised herein, and the increasing complexity of administrative agencies and their regulations, issuance of the writ is all the more appropriate.

A. The Eleventh Circuit's decision affirming admissibility of expert testimony to explain the controlling law conflicts with decisions of the Sixth and Second Circuits

The Court's decision in this case that admission of Stanley Sommerfield's explanatory legal testimony did not constitute reversible error, is in direct conflict with a recent opinion of the Sixth Circuit and an earlier decision of the Second Circuit. In United States v. Zipkin, 729 F.2d 384 (6th Cir. 1984) and Marx & Co. v. Diner's Club, Inc., 550 F.2d 505 (2d Cir.) cert. denied 434 U.S. 861 (1977), the Sixth and Second Circuits, respectively held that such testimony improperly displaces the role of the judge, intrudes upon the functions of the jury and confuses and disrupts the division of responsibilities between the court and the jury.

The facts of Zipkin and Marx strikingly parallel those in this case. In Zipkin a bankruptcy judge was permitted to testify at trial concerning the meaning of the bankruptcy laws and an order he had issued in a prior

related proceeding. Just as in this case, the official status of the expert witness conveyed the impression of governmentally sanctioned wisdom and authority in the particular field of law about which he testified. In both cases, the expert witness interpreted a document which he himself had written in the specialized field of law. Thus, it was as inevitable in Fuentes-Coba, as it was in Zipkin, that a jury would defer to the expert's opinion.

In Marx the expert witness, a noted securities lawyer, testified at length as to the meaning of "best efforts" as applied to certain filings with the Securities and Exchange Commission. The witness concluded that the evidence adduced at trial did not constitute "best efforts." The Second Circuit reversed, holding that the expert's testimony had gone beyond admissible explanation of routine securities law practices to embrace "legal opinions" and "the legal significance of various facts adduced at trial." 550 F.2d at 509,510.

Consistent application of the principles recognized in Zipkin and Marx would compel reversal of Fuentes-Coba's conviction. Sommerfield's testimony expanded impermissibly into a partisan, legal exegis of the law of Foreign Assets Control, and a prejudicial conclusory statement that the facts alleged in the indictment could never come within the scope of the law (tr. at 369, 371). The damage done to Fuentes-Coba by the admission of Sommerfield's testimony thus was as significant as the damage done in Marx and Zipkin. Only if Zipkin and Marx were wrongly decided, and the Court of Appeals correct in this case, can Fuentes-Coba's conviction be permitted to stand. Such a direct conflict among the circuits makes the issue ripe for review by this Court. See, Rule 17.1(a), Supreme Court Rules.

The difference between the opinions of the Eleventh Circuit and those of the Second and Sixth Circuits is no mere discretionary variation in the standards governing admissibility of expert testimony. To the

contrary, and, for purposes of this petition most significantly, the difference is at the core of trial by jury: the proper distribution of functions among judge, jury, and witness. It is fundamental that it is the role of the judge to find the law and the role of the jury to find the facts. The expert witness' role is to serve as an aid to the jury in making factual findings - not to displace the jury. See, e.g., D. Louiselle and C. Muller, Federal Evidence, §39 (1979); McCormick, Handbook of the Law of Evidence, §12, Second Edition (1972); 3 J. Weinstein and M. Burger, Weinstein's Evidence, Para. 704[1] at 704-5; 9 J. Wigmore, Evidence, §2549 (3 ed. 1940).

It is "not proper for the witness to testify as to a legal conclusion; it is the sole function of the trial judge to instruct the jury on the law." United States v. Zipkin, 729 F.2d at 387. Both the Second and Sixth Circuits have recognized that explanatory legal testimony by an expert witness conveys the dangerous and erroneous impression that the witness is more knowledge-

able than the court. United States v. Zipkin, 729 F.2d at 387; Marx & Co. v. Diner's Club, Inc., 550 F.2d at 550. Moreover, admission of such testimony gives "the appearance that the court [is] shifting to witnesses the responsibility to decide the case." Marx & Co. v. Diner' Club, Inc., 550 F.2d at 550. See, also, United States v. Jensen, 608 F.2d 1349, 1356 (10th Cir. 1979).

This danger is all the more severe where, as in this case, the witness testifies extensively on interpretations and implications of the controlling law. Admission of the expert's testimony in such matters often borders upon - if it does not actually constitute - abdication of the judge's function. The complexity of the particular statutory scheme at issue cannot serve as justification for the abdication of judicial responsibility. "The danger is that the jury may think that the 'expert' in the particular branch of the law knows more than the judge - surely an inadmissible inference in our system of law." Marx & Co. v. Diner's Club, Inc., 550 F.2d at

512.

While the Second Circuit and Sixth Circuit reach this result by slightly different theories, the significant fact is that both come to the same conclusion. The Second Circuit finds that the appearance of judicial abdication of decision-making authority to the expert witness is dangerous; the Sixth Circuit reasons that, by having the expert witness present the law as a matter of fact for the jury, the court actually impermissibly delegates to the jury its obligation to determine the law. "It is impermissible to delegate that function to a jury through the submission of testimony on the controlling legal principles." United States v. Zipkin, 729 F.2d at 387.

Whichever rationale is applied - the result is obviously the same. When judge and jury defer to the view of the expert witness, the expert witness has virtually dictated defendant's guilt. While an exegesis by a neutral court-appointed expert may be appropriate in some cases of highly complex

technical regulations, it is clear that deferring to a party witness' interpretation of the law virtually hands victory to that party.

B. Admission of explanatory legal testimony by an Executive official violates the separation of powers mandated by the Constitution

In permitting petitioner's conviction to stand based upon the testimony of Sommerfield, the Court of Appeals sanctioned an unconstitutional delegation of powers and an abdication of judicial responsibility. Here, the trial court had permitted the former Executive official to interpret the applicable law for the court and the jury in a way which became binding on the trier of fact. The Court of Appeals' acceptance of this result not only confirms the constitutional violation, it creates a dangerous precedent harmful to our courts' independence.

Section 5(b) of the Trading With the Enemy Act, 50 U.S.C. Appendix 5(b), is the enabling statute of the Cuban Foreign Assets Control Regulations. It authorizes

the President, through an agency designated by him, to proscribe, prohibit or otherwise regulate transactions involving property subject to the jurisdiction of the United States in which any foreign country or national has an interest.[2] But, the statute does not authorize the Executive branch to interpret its own regulations after the fact for the purpose of adjudicating guilt for violations of the statute. Indeed, the Executive branch

---

2 At all times relevant to this Petition, 50 U.S.C. Appendix 5(b) stated in pertinent part:

> (1) During the time of war or any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise...
>
> (2) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,
>
> by any person, or with respect to any property, subject to the jurisdiction of the United States.

does not have such power consistent with Article III of the United States Constitution which vests the authority to decide cases and controversies solely in the courts.

Judicial independence is fundamental to constitutional justice. C. Fredericks, Constitutional Government and Democracy: Theory and Practice in Europe and America, at 179 (4th ed. 1958); The Federalist Papers, No. 78 at 466 (A. Hamilton) (mentor ed. 1961). The Framers intentionally created a Constitution conferring separate and distinct powers upon the Legislative, Executive and Judicial Branches of the Federal Government and restricting each to the exercise of its appointed powers. O'Donoghue v. United States, 289 U.S. 516, 530 (1933). See, also, United States v. Grimaud, 220 U.S. 506 (1910); Union Bridge Co. v. United States, 204 U.S. 364 (1906).

This Court has emphasized that it is equally important that each branch be kept completely independent of the others:

> [T]he acts of each shall never be controlled by, or subjected, directly or indirectly, to the coercive

> influence of either of the other departments.

O'Donoghue v. United States, 289 U.S. at 530.

Thus, the Executive Branch may not direct a verdict of guilt, by means either direct or indirect, just as surely as it may not adjudicate guilt itself. When, in the guise of an "expert" witness, the former Director of the Office of Foreign Assets Control entered the courtroom to dictate the law to the jury, a fundamental principle of constitutional law was violated.

For more than a century, the constitutional rule has been that "counsel cannot appeal to a jury to decide legal questions by...giving in evidence the opinions of public officers," Roberts v. Cooper, 20 How. 467, 481 (1857). "Such testimony cannot be read as evidence of what the law is or ought to be." Id. Accord, Federal Aviation Administration v. Landy, 705 F.2d 624, 632 (2nd Cir.) cert. denied _____ U.S. _____, 104 S.Ct. 243 (1983); Huff v. United States, 273 F.2d 56 (5th Cir.

1959).

Moreover, Stanley Sommerfield was more than a federal administrator. As the author of federal regulations having the force of law, he was a quasi-legislator. He testified to the jury that he had drafted the Cuban Foreign Assets Control Regulations and signed them into law (tr. 363). His testimony was therefore also inadmissible under the principle that lawmakers may not testify on the meaning of laws they have written. Sutherland, J.G., Statutes and Statutory Construction, §4816 (F.E. Horak, Jr. ed. 1943).

The rule of Roberts v. Cooper is so basic a part of the law of evidence, as mandated by the Constitution, that for many years it has been observed with an almost automatic diligence. The Court of Appeals' opinion in this case is not faithful to that principle.

The Court apparently reasoned that statutory vagueness and complexity are adequate reasons to defer to administrative agency

expertise. Yet, it is just these factors which require that criminal convictions based upon regulatory violations be adjudicated with the broad-minded and flexible wisdom of the courts, rather than solely on the basis of the partisan and self-interested view of the regulator. See, Shapiro, Martin, The Supreme Court and Administrative Agencies (1968) at 52.

Despite the proliferation of administrative agency authority, administrative power is obviously finite and constitutionally limited. Administrative agencies may not declare an act to be a crime; such power rests in the legislature alone. United States v. Grimaud, 220 U.S. 506 (1910); Union Bridge Co. v. United States, 204 U.S. 364 (1906). Similarly, administrative agencies may not adjudicate guilt or impose imprisonment; such power and responsibility belongs exclusively to the courts. Wong Wing v. United States, 163 U.S. 228 (1896). As the noted constitutional scholar, Professor Bernard Schwartz, has emphasized:

> "This rule remains of cardinal consequence. The absence of non-judicial powers of imprisonment sharply distinguishes our legal system from those we disparagingly describe as totalitarian."

B. Schwartz, Administrative Law (1976) at 77.

This Court has clarified and defined the parameters of domestic power between the legislative and executive branches of Government. See, United States v. Grimaud, 220 U.S. 506 (1910) (administrative agencies may promulgate rules and regulations having the force of law but a person may be held criminally liable for violation of the regulation only if the enabling statute passed by the legislature makes violation of the regulations a crime). As this case shows, it is equally important that this Court provide guidelines on the relationship between executive branch agencies and the courts which are applicable to expert witness testimony.

Moreover, the damage clearly is irreparable when a witness with authoritative

status offers explanatory legal testimony for the prosecution. The Sixth Circuit recently held that such testimony "amount[s] to a statement that under the applicable law the defendant was guilty," United States v. Zipkin, 729 F.2d 384, 387 (6th Cir. 1984)(Bankruptcy judge's testimony on bankruptcy law is inadmissible despite incisive cross-examination).

This Court has held, in other contexts, that the jurors' seriously erroneous impression of a key witness, left uncorrected by the court, may violate the due process clause. Speaking in the context of the confrontation clause, this Court has held that:

> "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them."

Smith v. Illinois, 390 U.S. 129, 132 (1968) quoting Alford v. United States, 282 U.S. 687, 688 (1931). Similarly, the jurors' excessive trust and confidence in a key witness, resulting in part from the witness'

authoritative official status, may work a denial of due process. Gonzales v. Beto, 405 U.S. 1052 (1972); Turner v. Louisiana, 379 U.S. 466 (1965) (both finding denials of due process where the key witness was also the bailiff or deputy of the jury).

In Gonzales and Turner, the prejudice stemmed, in substantial part, from the fact that the key witnesses appeared to the jury to have a special relationship to the legal authority of the court. Identically, in this case, when Sommerfield was presented to the jury as the man who wrote the law, he appeared to be vested with special governmental authority and power. The jurors could not help but assume that Sommerfield's role was to teach them the law and tell them the correct verdict.

Scholars have discovered that expertise and trustworthiness are the two most important factors affecting the credibility which jurors give to witnesses' testimony. See, e.g., S.C. Bank and N.G. Poythress, The Elements of Persuasion in Expert Testimony, 10 J. Psych.L. 173 (1982)

at 173. Sommerfield appeared to the juror as the very pinnacle of these factors: expertise - as the author and longtime interpreter of the Regulations - and trustworthiness - as a high ranking official of the Executive branch.

While there is no error in properly placed attributions of credibility, the special credibility accorded to Sommerfield's testimony in this case was unconstitutionally spurious. Because of the constitutional separation of functions among the branches of government, drafters of regulations are not specially qualified to testify on their meaning. To the contrary, they are incompetent to do so. See, Sutherland, J.G. Statutes and Statutory Construction, §4816 (F.E. Horak, Jr. ed. 1943). The special legal knowledge of the judge made Sommerfield's testimony superfluous and irrelevant, Owen v. Kerr-McGee, Corp., 698 F.2d 236, 240 (5th Cir. 1983); Marx & Co. v. Diner's Club, Inc., 550 F.2d 505.510 (2nd Cir. 1977). And the erroneous impression that Sommerfield had special competency to dictate the law of the

case worked a prejudice of constitutional dimension upon the Petitioner.

Viewed in this light, the harm in the Court of Appeals' decision is apparent. By permitting Sommerfield to testify, the administrative agency was given the opportunity to dictate to the jury its interpretation of the same regulation which it drafted and therefore to convict defendant of a crime it created. This Court should review the dangerous precedent created by the Court of Appeals which opens the door to adjudication by Executive fiat.

C. Admission of explanatory legal testimony violates the limits placed on expert testimony by Federal Rule of Evidence 704

Rule 704, Fed. Rules of Evid., permitting expert testimony which "embraces an ultimate issue to be decided by the trier of fact" does not throw open the door to explanatory legal testimony. The Notes of the Advisory Committee on Proposed Rules state that "opinions phrased in terms of inadequately explored legal criteria" remain inadmissible.

The Eleventh Circuit's decision in this case, holding that Sommerfield's testimony was admissible because it "did not resolve the ultimate question of whether the activities constituted willful violations of the law," 738 F.2d at 1197, virtually turns Rule 704 upside down. It thus spotlights the confusion and uncertainty which has accompanied application of Rule 704 in the majority of circuits; a confusion which makes appropriate guidance from this Court urgently necessary.

While many courts recognize the need to "remain vigilant against the admission of legal conclusions," and acknowledge that "an expert witness may not substitute for the court in charging the jury regarding the applicable law," United States v. Milton, 555 F.2d 1198 (5th Cir. 1977), this understanding is not universal. As best illustrated by the case at bar, the lack of clearly developed guidelines for the application of Rule 704 has resulted in an uncertain line of opinions.

Rule 704 was designed to effect only a limited change in the law of evidence.

The Rule's enactment culminated the common law trend toward abolishing the prohibition of testimony on "ultimate facts," See, Stoebeck, W.B., Opinions on Ultimate Facts: Status, Trends and a Note of Caution, XL Denver L.Cen. J. 226. Together with the other rules in Article VII, Fed. Rules of Evid., Rule 704 was promulgated to eliminate the awkward and hard to follow hypothetical questions which made expert witness testimony stilted and confusing. See, McNichols, R., Some Random Thoughts on The Proposed Federal Rules of Evidence, 7 Idaho L.Rev. 187 (1970). However, the Rule was never intended to alter the traditional balance of responsibilities between the court, as finder of the law, and the jury, as finder of the facts, nor to invite the court to abdicate its responsibilities in favor of a witness. The Rule was not intended to shift these responsibilities to expert witnesses who would give legal "mini-lectures" on the applicable law, as Stanley Sommerfield did in this case.

While the border between fact and

law sometimes is difficult to discern, see, Owen v. Kerr-McGee Corp., 698 F.2d 236, 240 (5th Cir. 1983); Wade v. Haynes, 663 F.2d 778, 784 (8th Cir. 1981), violation of the Rule at this trial was evident. Sommerfield's expert witness testimony was, quite simply, a full and partisan exegesis of the law of Cuban Foreign Assets Control, leading inescapably to the conclusion that in the witness' expert view, the petitioner had violated the law. As summarized in the Court of Appeals' opinion:

> Sommerfield went into great detail to explain the embargo, its exemptions and the licensing provisions for specific commercial transactions.

738 F.2d at 1197. This case thus provides a compelling test of the outer limits under Rule 704 of legal commentary by expert witnesses.

CONCLUSION

For the reasons stated, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,

Randy Frances Kandel

RANDY FRANCES KANDEL
Shereff, Friedman, Hoffman
& Goodman
919 Third Avenue
New York, New York 10022
(212) 758-9500

Of counsel to:

McMasters & Forman, P.A.
321 N.E. 26th Street
Miami, Florida 33137

James McMasters
McMasters & Forman, P.A.

David Rudovsky (by RFK)

David Rudovsky
1425 Walnut Street
Philadelphia, Pennsylvania 19102

OF COUNSEL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petition of Fernando Fuentes-Coba for Writ of Certiorari has been this date of December 16, 1984, furnished by mail to the Office of the United States Attorney, Attention: Paul DiPaolo, 155 S. Miami Avenue, Miami, Florida 33310.

By Randy Frances Kandel

Randy Frances Kandel
Shereff, Friedman,
Hoffman & Goodman
919 Third Avenue
New York, New York 10022
(212) 758-9500

Of counsel to:

McMasters & Forman, P.A.
321 N.E. 26th Street
Miami, Florida 33137

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FERNANDO FUENTES-COBA,
Defendant-Appellant.

No. 83-5011.

United States Court of Appeals,
Eleventh Circuit.

Aug. 13, 1984.

Appeal from the United States District Court for the Southern District of Florida.

Before HENDERSON and CLARK, Circuit Judges, and ATKINS*, District Judge.

ALBERT J. HENDERSON, Circuit Judge:

Fernando Fuentes-Coba appeals his jury conviction in the United States District Court for the Southern District of Florida on a charge of conspiracy to violate the Trading with the Enemy Act and the Cuban Assets Control Regulations, pursuant to 18 U.S.C.

---

* Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

§ 371, 50 U.S.C. Appendix § 5(b) and 31 C.F.R. § 515.201.

The Cuban Asset Control Regulations, 31 C.F.R. § 515.201 et seq. ("Regulations"), were promulgated in 1963 pursuant to the Trading with the Enemy Act of 1917 ("Act").[1] The Regulations prohibit all commercial interchange with Cuba or Cuban nationals, with specific exemptions as set out in the Regulations.

In 1977, certain restrictions on the previous policy of prohibiting free travel by Americans to Cuba were removed by President Carter. Although the Cuban trade embargo remained firmly in effect, the Regulations were amended to establish a general authorization for Americans to travel to Cuba and to spend money incident to that travel. The general authorization also allowed American-owned travel agencies to provide travel

---

1 The Act gives the President broad authority to impose comprehensive embargoes on foreign countries as a means of dealing with emergencies during peacetime and in times of war.

service and services incident to travel to Americans going to Cuba.

Beginning in March 1979, American Airways Charters, Inc. ("AAC") furnished chartered aircraft services for flights to Cuba to Havanatur, the travel agency exclusively authorized by Cuba to provide tourist services in Cuba. The appellant, Fuentes-Coba, was the president and chief operating officer of AAC.

In the latter part of 1979, the United States Treasury Department's Office of Foreign Assets Control designated Havanatur as a Cuban national company pursuant to § 515.306 of the Regulations. The effect of this designation was to prohibit any transactions between Americans and Havanatur.

According to testimony adduced at the trial, the chief operating officers of Havanatur then formed successor companies in order to continue their operations. Fuentes-Coba met with these officers and discussed strategies to disguise what proved to be a continuing AAC association with the Havanatur

principals. The participants specifically discussed the necessity of a license to transport goods to Cuba. Fuentes-Coba stated that he was aware of the licensing requirement.

As part of the dealings with Havanatur, AAC transported several items of contraband into Cuba. Among the items transported were four Pepsi-Cola dispensing machines, communications equipment, office equipment and supplies, numerous quantities of foodstuffs, United States currency, perfume, scuba equipment, mail, auto parts and tires and aircraft parts. Testimony at the trial also revealed that computer equipment had been obtained in the United States and sent to Cuba.

According to the testimony, Fuentes-Coba personally concealed certain of the items in duffel bags before they were loaded on the aircraft. He also often accompanied his company van to the airport in an effort to avoid United States Customs inspection of the goods.

Fuentes-Coba was tried for his role in the shipment of these goods to Cuba, and was convicted of conspiracy. He was sentenced to one year of imprisonment and ordered to pay a fine of ten thousand dollars ($10,000.00). This appeal followed.

I.

Fuentes-Coba filed a pretrial motion for a change of venue contending that adverse publicity made it impossible to impanel an impartial jury in south Florida on issues related to trade with Cuba. The evidence presented in support of the motion consisted of an extensive public opinion survey of potential jurors and an analysis of media coverage of Cuba in the south Florida press conducted by a purported expert on jury prejudice.

[1, 2] A criminal defendant is not constitutionally entitled to a trial by jurors ignorant of issues and events. Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751, 756 (1961). Rather, due process requires only that a jury be seated which can put aside any impressions

gained from pretrial publicity and render a fair verdict based exclusively on the evidence presented in court. 366 U.S. at 723, 81 S.Ct. at 1643, 6 L.Ed.2d at 756; Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); Murphy v. Florida, 421 U.S. 794, 800, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589, 594-95 (1975). In the event of juror exposure to pretrial publicity, a defendant may successfully appeal his conviction only if he is able to demonstrate that actual prejudice resulted from the publicity. Irvin v. Dowd, 366 U.S. at 723, 81 S.Ct. at 1643, 6 L.Ed.2d at 756; United States v. Thompson, 615 F.2d 329, 333 (5th Cir. 1980).[2]

[3] After reviewing the survey evidence presented by Fuentes-Coba and determining that no prejudice had been demonstrated, the district court conducted a voir dire

---

2 In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as precedent all decisions of the former Fifth Circuit decided prior to October 1, 1981.

examination of the jury exploring any potential bias of the jurors. The jurors responded that they could be fair and impartial in the case. Counsel for the appellant also extensively inquired of the veniremen with respect to their feelings about Cuba and Cuba-oriented organizations. Again, no juror expressed concern about the influence of outside factors. Finally, the government interrogated the jurors for possible bias and none responded affirmatively. Thereupon, both the government and the defendant accepted the panel and proceeded with the selection of the jury which heard the case. The defendant did not renew his motion for change of venue.

The thorough inquiry of the jury panel with respect to potential bias was sufficient to safeguard the right of Fuentes-Coba to an impartial trial.

II.

Fuentes-Coba asserts that his conviction cannot stand because his acts were fully authorized under the licensing provisions of the Cuban Foreign Assets Control

Regulations, 31 C.F.R. 515.201 et seq., and the Export Administration Regulations, 15 C.F.R. 371 et seq. In the alternative, he argues that even if his activities were technically in excess of the scope of his licensed authority, his conviction should be overturned because the Regulations are so vague and ambiguous that they fail to pass muster under the due process guarantee of the fifth amendment.

Under the broad language of § 515.201, which establishes the general embargo against transactions in which Cuba or Cuban nationals have an interest, a transaction is permitted only if it is exempted under the more specific language of a subsequent regulation. Fuentes-Coba characterizes each of the items he is charged with shipping from this country to Cuba as a specifically exempted good.

He primarily relies on § 515.560, which authorizes transactions incident to arranging or assisting travel to, from or in Cuba, including arranging hotel accommo-

dations, ground transportation, local tours and similar travel activities. He contends that this regulation expressly authorized his exportation of the many items identified at the trial. He claims that all of the items were utilized in the tour operations.

The precedent and practice of this court demands an interpretation of the Act and Regulations with "a common sense regard for regulatory purposes and plain meanings." United States v. Frade, 709 F.2d 1387, 1401 (11th Cir. 1983). Applying this standard to the facts before us, we conclude that the appellant's shipping activities went well beyond the § 515.560 exceptions to the Act.

[4] We simply do not agree with the appellant that the shipment of such items as airplane parts, bulk quantities of United States coins, and communications equipment can reasonably be considered as incident to travel, as specified in the Regulations. If we accept the appellant's argument, the exception to the trade embargo would become so broad that the embargo itself would lack

substance. We cannot countenance such a claim.

[5] Neither can we embrace the appellant's companion claim that shipment of the majority of the items was authorized by § 515.333 which governs general baggage and gift parcels authorized for transport by Cuban-bound travelers.[3] First, many of the items seized simply fail to fit the description of property normally transported in a traveler's baggage for his or her personal use. Second, the items were not marked as gift parcels, as specifically required by the regulation, and many do not fall into the property categories authorized in the regulation.

Finally, we find no grievous ambiguity in the Regulations themselves. They are clear in scope and adequately delineate the restrictions in existence. There is no merit in the appellant's due process challenge.

---

3 Regulation 515.533 incorporates in full the baggage and gift parcel regulations issued by the Export Administration, U.S. Department of Commerce, set out at 15 C.F.R. § 371.6 and 371.18.

III.

[6] Guilt under the Act and its Regulations mandates a finding of specific intent - that is, the government must prove that the regulatory provisions were both "actually known" and "deliberately violated" by the defendant. United States v. Frade, 709 F.2d 1387, 1392 (citations omitted). Fuentes-Coba maintains that there was no evidence of specific intent and that the jury instruction of the district court was deficient in that it did not enumerate and particularize these elements and issues.

[7-10] In reviewing the sufficiency of the evidence to support a guilty verdict, the evidence, and all reasonable inferences therefrom, is viewed in the light most favorable to the government. Hamling v. United States, 418 U.S. 87, 124, 94 S.Ct. 2887, 2911, 41 L.Ed.2d 590, 624-25 (1974); Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704 (1942). To prove conspiracy, the government must show an agreement between two or more persons to commit a crime and that

the defendant knowingly and voluntarily participated in the illegal venture. United States v. Vera, 701 F.2d 1349, 1357 (11th Cir. 1983). The existence of such an agreement may be proved by circumstantial evidence. United States v. Tamargo, 672 F.2d 887, 889 (11th Cir.), cert. denied 459 U.S. 864, 103 S.Ct. 141, 74 L.Ed.2d 119 (1982). The burden is on the government to prove that the defendant knew the essential object of the conspiracy. United States v. Russell, 703 F.2d 1243, 1249-50 (11th Cir. 1983).

[11] Ample evidence was introduced at the trial to support a finding of each of the required elements. Testimony disclosed that Fuentes-Coba personally stowed contraband goods in duffel bags and sometimes supervised loading of the goods onto AAC aircraft. Moreover, the appellant participated in several conversations in which he acknowledged that the goods to be shipped were subject to the trade embargo and the Regulations.

In attacking the specific intent instruction, Fuentes-Coba complains that the

court erred in failing to instruct the jury that the lack of specific intent is a complete defense and by neglecting to explain the applicable Regulations.

[12, 13] Fuentes-Coba did not object to the court's instructions either before or after they were given to the jury, and there was no request for additional instructions on these issues. We therefore evaluate the charge under the plain error standard viewing the charge in its entirety and in the context of the entire trial. United States v. Park, 421 U.S. 658, 674-75, 95 S.Ct. 1903, 1912-13, 44 L.Ed.2d 489, 502-03 (1975). The conviction will be set aside only where the charge is so clearly erroneous as to result in a likelihood of a grave miscarriage of justice or where it seriously affects the fairness, integrity or public reputation of a judicial proceeding. United States v. Thevis, 665 F.2d 616, 645 (5th Cir. Unit B), cert. denied, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982).

[14] The instructions given, viewed in the light of the entire charge, clearly re-

veal that the district court adequately instructed the jury as to specific intent and correctly stated the applicable regulations. The court charged:

> The word knowingly, and that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposefully, with the specific intent to do something the law forbids; that it [sic] to say with bad purpose either to disobey or disregard the law.

Further, having thus instructed the jury, there was no error in the court's failure to also charge that ignorance of the law is a complete defense. See United States v. Bush, 599 F.2d 72, 77 (5th Cir. 1979); United States v. Wellendorf, 574 F.2d 1289 (5th Cir. 1978).

[15] Finally, the trial court's charge on the applicable regulations was clear and simple and carefully explained the specific regulation which formed the predicate for the violation. Fuentes-Coba now complains that the jury should have been apprised of additional regulations which related to one of his affirmative defenses. We can find no plain error in this omission given the fact that he failed to seek such instruction even though he fully am-

plified on his defenses in his argument to the jury.

IV.

During the trial, the government called as a witness Stanley Sommerfield, the former chief counsel and director of the Office of Foreign Assets Control, the executive branch office responsible for enforcing the Act and Regulations. Sommerfield explained the embargo and the exemptions pertaining to the travel agency business, as well as the licensing provisions for specific commercial transactions.

Fuentes-Coba contends that the admission of Sommerfield's testimony was improper because it violated the rules proscribing testimony of legislators and executive officials, legal interpretations by expert witnesses, and expert statements reflecting the defendant's guilt. The government replies that Sommerfield's testimony was admissible for the purpose of exploring and evaluating Fuentes-Coba's specific intent to violate the Cuban trade embargo, and that there was no prejudice in

its admission.

Fuentes-Coba failed to object to Sommerfield's testimony. In fact, he extensively cross-examined Sommerfield on the meaning and scope of the Regulations in an attempt to develop his own defense theory. So again we review this claim under the standard of plain error, United States v. Hernandez-Cuartas, 717 F.2d 552, 555 (11th Cir. 1983), recognizing only that which is obvious and affects the appellant's substantial rights and "where exceptional circumstances make it necessary to avoid a clear miscarriage of justice." United States v. Cormier, 639 F.2d 1177, 1182-83 (5th Cir. Unit B 1981).

[16] As one of his major defenses, Fuentes-Coba alleged that the Regulations are so complex that his misunderstanding of them excused his otherwise criminal conduct. In view of this defense, we are not persuaded that the admission of Sommerfield's testimony was plain error. At the behest of both the government and the appellant, Sommerfield went into great detail to explain the embargo, its

exemptions and the licensing provisions for specific commercial transactions. This testimony did not unfairly undermine Fuentes-Coba's specific intent defense, but instead provided the jury with a valuable perspective, fully developed by both sides, from which it could evaluate the issues.

Furthermore, the testimony did not invade the province of the court in its determination of the applicable law, see Federal Aviation Administration v. Landy, 705 F.2d 624, 632 (2d Cir.), cert. denied, ____U.S. ____, 104 S.Ct. 243, 78 L.Ed.2d 232 (1983), or of the jury in its evaluation of the facts in the light of that law. See Marx & Co., Inc. v. Diners' Club, Inc., 550 F.2d 505, 510 (2d Cir.), cert. denied, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977).

Sommerfield's comments on the Regulations were certainly useful to the jury in determining how the acts of Fuentes-Coba fit within the Regulations' parameters, but they did not resolve the ultimate question of whether the activities constituted willful

violations of the law.

Particularly because Fuentes-Coba did not object to this testimony, and because Sommerfield was thoroughly cross-examined on the issues raised on appeal, we find no plain error in the admission of his testimony.

V.

During his closing argument, the prosecutor made an indirect reference to the fact that Fuentes-Coba did not take the stand in his defense. The reference came in a remark on the weight to be given certain testimony.[4]

---

4 The prosecutor made the following comment:

> There were American quarters, three boxes of them, about this big. They were full of quarters. That is what he observed.
> Now, there is a violation of the embargo. There is no exception and no defense to it. The only question is did Mr. Fuentes know, the President of American Airways Charters know what was going on with his own company? He wants to suggest, no, he didn't know. He was in Hialeah or here.
> The judge will tell you the defendant in a criminal case never has to take the stand and testify and that is important because there are some obvious areas brought up by the cross-examination, by the witnesses that were called by Mr. McMaster which will require your consideration. In effect, there are two sides to the story.

Fuentes-Coba contends that the reference constitutes reversible error.

[17] In this circuit, such remarks constitute reversible error if either (1) it is the prosecutor's manifest intention to comment on the defendant's failure to testify, or (2) the remark was such that the jury would naturally and necessarily take it as a comment on the defendant's failure to testify. Williams v. Wainwright, 673 F.2d 1182, 1184 (11th Cir. 1982); United States v. Garcia, 655 F.2d 59, 64 (5th Cir. Unit B 1981). In making this determination, it is necessary to examine the comments within the context of the total argument. Id.

[18] We have examined the prosecutor's remark in this light and find no error requiring a reversal. It appears to have been directed at the alleged failure of the defense to counter or explain certain evidence and was not meant to draw attention to the fact that Fuentes-Coba did not testify. We agree with the district court that the prosecutor did not act deliberately and that the remark was not

susceptible of improper interpretation by the jury.

VI.

[19] At the conclusion of the trial, one juror stated he could not read or write. The district court sequestered the jury and ordered it not to commence its deliberations. The judge then conducted a hearing into the juror's qualifications, finding that he was not qualified to sit on the jury.

During a recess in the hearing, Fuentes-Coba and his attorney were afforded the opportunity to discuss the situation. Upon returning to the courtroom, Fuentes-Coba moved for a mistrial. The district court denied the motion but offered Fuentes-Coba three options: agree to allow the unqualified juror to remain on the jury, stipulate to using eleven jurors, or seat the alternate juror. Both parties then stipulated to permit the unqualified juror to continue with the case.

Fuentes-Coba now claims that the district court erred in leaving the unqualified juror on the panel. He recognizes that a de-

fendant may waive his right to challenge the competency of a juror, see United States v. Renfro, 620 F.2d 569, 577 (6th Cir.), cert. denied, 449 U.S. 902, 101 S.Ct. 274, 66 L.Ed.2d 133 (1980); Delgado v. United States, 403 F.2d 208, 209 (9th Cir. 1968), cert. denied, 394 U.S. 966, 89 S.Ct. 1320, 22 L.Ed.2d 568 (1969), but maintains that he did not waive this right because he had moved for mistrial.

We find it anomalous for Fuentes-Coba now to raise this point, since he expressly passed up opportunities to cure the defect in the trial court. Also, we note that since the jury had not yet commenced its deliberations, the court, on its own motion, was authorized to substitute the alternate. United States v. Gay, 522 F.2d 429, 435 (6th Cir. 1975). Accordingly, we find no error.

The judgment of the district court is AFFIRMED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

No. _____

FERNANDO FUENTES-COBA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX B

Order of the United States Court of Appeals

Denying

Petitioner's Motion for Rehearing and
Suggestion for Rehearing En Banc.

October 15, 1984

BEST AVAILABLE COPY

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-5011

US COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
OCT 15 1984
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FERNANDO FUENTES-COBA,

Defendant-Appellant.

- - - - - - - - - - - - -

Appeal from the United States District Court for the
Southern District of Florida

- - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 13, , 11 Cir., 1984, F.2d).

(OCT 15 1984)

Before HENDERSON and CLARK, Circuit Judges, and ATKINS*, District Judge

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

*Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

REHG-6 (Rev. 6/82)

BEST AVAILABLE COPY